



Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

2001

Getting the Insider's Story Out: What Popular Film Can Tell Us about Legal Method's Dirty Secrets

Rebecca Johnson

Ruth Buchanan

rbuchanan@osgoode.yorku.ca

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Film and Media Studies Commons](#), and the [Legal Profession Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Buchanan, Ruth and Johnson, Rebecca, "Getting the Insider's Story Out: What Popular Film Can Tell Us about Legal Method's Dirty Secrets" *Windsor Yearbook of Access to Justice* 19 (2001): 87-110.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

GETTING THE INSIDER'S STORY OUT: WHAT POPULAR FILM CAN TELL US ABOUT LEGAL METHOD'S DIRTY SECRETS

by

Rebecca Johnson*

Ruth Buchanan**

I said there is no justice as they led me out the door and the Judge said,

"This isn't a court of justice, it's a court of law."

-Line from a Billy Bragg song, "Waiting on Remand," Worker's Playtime (1988)

In this paper, the authors seek to use the insights gained by viewing and thinking critically about a range of Hollywood films to better illuminate the disciplinary blindspots of law. Both law and film are viewed as social institutions, engaged in telling stories about social life. Hollywood films are often critical of law and legal institutions. Law is dismissive of its representation within popular culture. However, the authors argue that law disregards cinematic cynicism about itself at its peril and that there is much to learn by taking cinematic portrayals of law very seriously—not as representations of the truth of law, but as analogies for how law itself operates in constructing truth. Indeed, the authors conclude by arguing that law requires a better conception of itself as a culturally productive institution. Law, like film, is not simply engaged in the finding of truth, but also more fundamentally in the making of meaning.

I. INTRODUCTION

Hollywood has long been obsessed with law, truth, and justice. In particular, Hollywood cinema has sought to trouble the correspondence between law and justice that is presumed by most traditional approaches to legal institutions and theory. A classic opposition between law and justice is found in films such as *Adam's Rib*, *Mr. Smith Goes to Washington* and *The Man Who Shot Liberty Valance*. The films work by creating a slippage between what is cinematically represented as the essential truth of a matter and a lesser, limited or distorted truth that the law is able to grasp. The dramatic tension turns on the desire that the "whole truth" be revealed so that justice may be done. More recent films that trade (sometimes ambivalently) upon this particular dichotomy include *The Thin Blue Line*, *Thelma and Louise* and *The Insider*. Sometimes a heroic protagonist (like a Karen Silkwood or an Erin Brockovitch) is able to save the day, stitching together the threads of law and justice through extraordinary perseverance and at great personal cost. Often, however, the legal system is seen as beyond

* University of British Columbia, Faculty of Law.

** University of Victoria, Faculty of Law.

The authors would like to thank participants at the workshop at UBC in April, 2000 who provided valuable feedback on an earlier draft of this paper and the UBC Hampton Fund for supporting the interdisciplinary project "Rethinking Law as Discipline" from which the project originated.

redemption. Outlaw films, like *Unforgiven* or *Thelma and Louise*, dictate that whatever measure of justice is to be seen will be in the hands of the characters.

Legal academics have also been troubled by these questions for some generations. Beginning with the insights of the legal realists in the first part of the last century, scholars have sought to point out the slippages between the ideals of law and its operation from many different perspectives. Fem-crits and law and economics scholars may find themselves united on little else, but their critiques of the operation of formal legal doctrine have the same source. The discipline of law, as we describe below, has remained, in some aspects, remarkably resilient to these critiques.

In the paper that follows, we seek to use the insights gained by viewing and thinking critically about a range of Hollywood films to better illuminate some of the more shadowy corners of our own discipline. While we are not suggesting that film-makers have any better access to "truth" about law than law professors, we do suggest that thinking about how both "justice" and the "real" are constructed in film will help us to see parallel processes at work in the legal world. The paper begins with a two part introductory section, in which we present the conceptual problematique of the paper and review the extant scholarship on law and film. In the second section, we examine three dimensions along which a new critical cinematic legal methodology might be constructed. Ultimately, we argue that the discipline of law disregards cinematic cynicism about itself at its peril. Indeed, we suggest that there is much to learn by taking cinematic portrayals of law very seriously, not as representations of the "truth" of law, but as analogies for how law itself operates in constructing truth.

II. THE DISCIPLINE OF LAW AND ITS CRITICS

A. Law, Truth and the Question of Meaning

This paper takes its inspiration (and its title) from the recent Hollywood film (based on a "true story") in which a recently fired executive of a tobacco company is convinced to go public with vital inside information concerning the tobacco industry's purposeful manipulation of the addictive properties of nicotine in their cigarettes by a deeply committed and strategically adept producer for the CBS news program 60 Minutes. Despite the producer's heroic efforts, the legal maneuverings of "big tobacco" manage to obstruct the public airing of the insider's interview. The interview is finally aired only when all the information has already become available to the public and the credibility of the "insider" has been virulently attacked in a personal smear campaign. While we will have more to say about this film later, by way of introduction we would simply like to point out that the story of *The Insider* directs our attention to a number of issues which we are troubled by. Among other things, the film reveals the deep interpenetration between the institutions of popular culture (here, the world of news-magazines and "infotainment") and law and invites us to consider the role of the legal system in the search for "truth."

At a most fundamental level, both this paper and the film are about

unpacking the role(s) law plays in the construction of social meaning. While both law and film are institutions which have historically enjoyed, in David Black's phrase, a "license to arbitrate the social imaginary," in neither case is this process particularly transparent. That is, the processes through which these institutions shape our perceptions of the meaning of things are neither generally acknowledged nor well understood. Legal institutions form a significant part of the terrain on which struggles over meaning take place and yet this paper will argue that scholars are hampered in their ability to effectively account for the social role of law because the discipline of law doesn't have an adequate conception of itself as a "meaning-making" as opposed to a "truth-finding" institution. The Hollywood film industry is not similarly constrained, and we will argue that rather than dismissing movies about law for their lack of technical veracity (e.g.: the "hearsay rule" did not work that way; a cross examining lawyer would *never* ask a question to which she didn't know the answer), we may look to films such as *The Insider* for the insights they provide into our own disciplinary blindspots. In the second part of this paper, we will identify and explore three insights related to the construction of meaning: the role of narrative; the role of "brute perception;" and the implications of audience reception and multiple readings. To some extent, these insights track arguments which have for some time been made by critical legal scholars, feminists, critical race theorists and others. However, in this paper, we seek not only to build on these critiques, but also to push them more firmly to the centre of public dialogue concerning both law's claims to legitimacy and its meaning-making function.

Our collaboration had its origins in an interdisciplinary project at the University of British Columbia, a project whose main ambition has been to examine a range of contemporary challenges to the process by which legal knowledge is constructed, and thereby, to influence our collective understandings of the nature of that knowledge. One of the guiding premises of that project is that despite considerable amount of social and legal change over the course of the past several decades if not the past century, conventional representations of the discipline of law have remained remarkably unchanged. From the outside, legal institutions, the practice of law and the law itself appear to have been dramatically transformed, yet from the inside (inside law schools, and to a lesser extent, courtrooms and law offices) the parameters of the discipline appear to have strayed little from their nineteenth century positivist roots. Even at the beginning of the 21st century, in the Canadian law schools where we spend our days, the law is conventionally understood as an autonomous, self-contained system of rules; to study the "law" means to study legal doctrine as found primarily in case law and statute; legal reasoning is taught as the primary "method" through which legal doctrine is articulated and discussed. The method of legal reasoning is presented as analogous to scientific reasoning; it is expected to aspire to the same standards of objectivity and coherence.

While our description of legal positivism may well seem trite to others "inside" the profession of law and law teaching, it will come as a surprise to many laypersons, whose understanding of the law is drawn from popu-

lar cultural texts such as John Grisham novels, or even notorious legal/media events such the O.J. Simpson trial. This disjuncture is one of the primary targets of this paper. As insiders to the discipline of law, we want to blow the whistle on legal positivism. However, to outsiders, particularly those versed in North American popular representations of law, legal institutions are hardly seen as the rational and objective truth-seeking bodies that they purport to be. So, then, to whom do we seek to tell our story? We are telling it to other insiders, but seeking to tell it using vehicles from the outside, primarily mainstream film portrayals of [law and] legal institutions. What we hope will be the result of our effort to turn law inside out in this way is a necessary and significant re-visioning of its disciplinary boundaries.

Disciplinary boundaries are almost always drawn around epistemological questions. Law is not unique in this respect. Further, questions of what count as "truth" in law, or what is legitimate legal knowledge, also engage the fundamental question of "what is law?" Bourdieu has observed that the stakes in a given field almost always engage the definition of the field itself.¹ In trying to engage with, and possibly redefine the parameters of law as a discipline, we recognize that we are playing a dangerous game that has serious consequences. However, we argue that the status quo, in which the field is maintained through cynical or naive allegiance to the positivist misconception, is also dangerous in different ways.

The legal positivist paradigm posits that "truth" can be identified through legal process, which itself is understood as capable of unbiased objective adjudication. Legal knowledge is that which is achieved, and is achievable, through legal reasoning. If we try to press the positivist framework a bit further, however, and ask whether legal knowledge is primarily concerned with justice, truth or meaning, we encounter some problems. Truth and justice, within positivism, are essentially the same thing. On the other hand, the question of meaning, which we take to be embedded in the larger question of the role of narrative, is subsumed to the truth/justice dyad. The narrative element of law, which is undoubtedly present even in the positivist vision, is somehow subsumed to the dictates of the truth/justice juggernaut.

If we are to cast ourselves in the role of "heroic" leaders of the charge for a paradigm shift away from the vestiges of legal positivism, we need to begin by re-imagining the relationship between truth, justice and meaning in law. It doing that, we will be informed by a larger epistemic shift toward an understanding of the links between social relations, power and truth; for example, the ways in which Foucault revealed the production of knowledge as an artifact of power relations.² Clearly legal knowledge needs to be able to perceive and account for the power relations which produce it and in which it cannot but be implicated. As Black puts it, "what is chiefly at

1 P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 *Hastings L. J.* 805.

2 M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. Trans. ed. by C. Gordon (New York: Pantheon Books, 1980).

stake (in looking at law as a narrative regime) is not the question of whether or not the various role players in the legal system tell stories (which they do) but rather, the role that narrative plays with respect to the further stakes of the legal process and legal power."³ While our essay will not focus on "power" per se, we recognize that the discussion of truth, meaning and justice necessarily takes place in its shadow and hopefully instructs us about its operation.

We have also been influenced by social theorists and cultural studies scholars who have considered the links between representation and reality in our media-saturated culture. These days, a working hypothesis about the nature of legal knowledge needs to account for the ways in which representations bleed into and shape the reality they purport to reflect—much as in the film, *Wag the Dog*, the Hollywood-produced representation of a war in Albania, was seen to change political realities in Washington. As law/film scholar Richard Sherwin observes, "What we commonly regard as 'truth' is not easily divorced from fiction. Indeed, it often resides there ... fictional models permeate factual discourse."⁴ To relate this back to law, at one level, this argument simply suggests that fictional models (narrative tropes, stock characters and so on) pervade forms of legal argument and legal decision-making as well. Not that they subsume it, but that they do function in particular ways within it, functions that we need to do a better job of accounting for.

To sum up, we seek to relocate the discipline of law firmly in contemporary culture; in a world in which it is commonplace to question linear narratives that seem to lead without difficulty to a particular "truth" of a matter, to subvert claims to truth as being subject to radically variant interpretations and to recognize the blurred boundaries between reality and representation.⁵ We understand now, in a way we perhaps did not 50 or 75 years ago, the extent to which subject positions (not to mention lighting and camera angles) can shape the way an event is experienced and how a narrative (legal or otherwise) is received. Films like *The Thin Blue Line*, *A Question of Silence*, and even *Thelma and Louise* have illustrated the tenuousness of law's claim to privileged access to truth, the troubled relationship between narrative and truth, and even the limits of language itself. It is to the realm of film we now turn, to examine some previous forays by legal scholars into this dangerous, enchanting realm.

B. When Law Professors Go to the Movies: A Brief Overview

In recent years, an interest in popular culture has been making its way

3 D.A. Black, *Law in Film: Resonance and Representation* (Urbana: University of Illinois Press, 1999) at 35.

4 R.K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: University of Chicago Press, 2000) at 47.

5 Particularly relevant and representative are B. Nichols, *Blurred Boundaries: Questions of Meaning in Contemporary Culture* (Bloomington: Indiana University Press, 1994) and V. Sobchack ed., *The Persistence of History: Cinema, Television, and the Modern Event* (New York: Routledge, 1996).

into the legal academy.⁶ Some have seen this as a natural extension of the law and literature movement. It may well be that the law and literature movement opened doors for the consideration of both popular culture generally and film in particular. We have seen the emergence of symposia devoted to questions of law and the cinematic gaze⁷ and edited collections devoted to law in film.⁸ However, while there is certainly a rise in attention to film in legal writings, this scholarship does not yet seem to bear the hallmarks of a "movement." One would, indeed, be hard pressed to identify any unifying theory or approach in this body of writing. Rather, what one sees is a number of quite different uses of film.

Sometimes, the concern is with realism and inaccuracy in the representation of law and lawyering. So, a writer may focus on artistic license taken in movies about law (i.e. pointing out the errors in procedure, rules of evidence, etc),⁹ or direct attention to concerns such as the representation of lawyers and lawyering,¹⁰ of law and race¹¹ or of female lawyers.¹² Sometimes, questions about realism and inaccuracy in film are used as a vehicle for discussing the nature of legal thinking and interpretation.¹³ And, in a yet more complex turn, questions of accuracy and reality in film have also facilitated the turn towards an exploration of postmodern uncertainty in law.¹⁴

6 See e.g. (1989) 98 *Yale L. J.* 1545 [Symposium: Popular Legal Culture]. While this phenomenon has had a strong American bent, it has also been evident in the Canadian context. See e.g. (1995) 10 *Can. J. L. & Soc.* [Symposium Issue on Law as Source of Popular Culture and Popular Culture as Source of Law]. See e.g. (2000) 48 *UCLA L. Rev.* [Symposium on Law and Popular Culture].

7 See e.g. (1996) 30 *U. San Fran. L.R.* 4 [Symposia on Picturing Justice: Images of Law and Lawyers in the Visual Media]; M. Chon & M. Russell eds., *Symposium on Race, Law and Film* (1998) 5 *Asian L.J.* 1. [hereinafter *Symposium on Race, Law and Film*].

8 J. Denvir ed., *Legal Reelism: Movies as Legal Texts* (Urbana: University of Illinois Press, 1996) [hereinafter *Legal Reelism*]; P. Bergman & M. Asimow, *Reel Justice: The Courtroom Goes to the Movies* (Kansas City: Andrews and McMeel, 1996) [hereinafter *Reel Justice*]. Both these texts are reviewed in D.H.J. Hermann, *The Law in Cinema*, (1998) 52 *N.Y.L.S.L.Rev.* 305.

9 See *Reel Justice*, *ibid.*. Also see G.F. Uelmen, "The Trial as a Circus: *Inherit the Wind*." (1996) 30 *U. San Francisco L. Rev.* 1111.

10 J. Grant, "Lawyers As Superheroes: *The Firm*, *The Client*, and *The Pelican Brief* (1996) 30 *U. San Francisco L. Rev.* 1111.

11 *Symposium on Race, Law and Film*, *supra* note 7.

12 There is a burgeoning literature exploring the representation of women lawyers in film. See S. Caplow, "Still in the Dark: Disappointing Images of Women Lawyers in the Movies" (1999) 20 *Women's Rts. L. Rep.* 55; L. E. Graham & G. Maschio, "A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film" (1995-96) 84 *Kentucky L.J.* 1027; C. Shapiro, "Women Lawyers in Celluloid: Why Hollywood Skirts the Truth" (1995) 25 *U. Toledo L.R.* 955; C. Shapiro, "Women Lawyers in Celluloid, Rewrapped" (1998) 23 *Vermont L. Rev.* 303; R. Sheffield, "On Film: A Social History of Women Lawyers in Popular Culture 1930 to 1990" (1993) 14 *Loyola of L.A. Entertainment L.J.* 73; C.A. Corcos "Portia and Her Partners in Popular Culture: A Bibliography" (1998) 22 *Leg. Stud. Forum* 269.

13 Black notes the use of this strategy in R. Laurence, "Last Night While You Prepared for Class I Went to See *Light of Day*: A Film Review and a Message to My First-Year Property Students, Annotated for My Colleagues," (1989) 39 *J. Leg. Edu.* 87.

14 Richard Sherwin has been particularly notable in this regard. See Sherwin *supra* note 4; R.K. Sherwin, "Law Frames: Historical Truth and Narrative necessity in a Criminal Case." (1994) 47 *Stanford L. Rev.* 39; R.K. Sherwin, "The Narrative Construction of Legal Reality." (1994) 18 *Vermont L. Rev.* 681 [hereinafter *Narrative Construction*]; R.K. Sherwin, "Picturing Justice: Images of Law and Lawyers in the Visual Media (Introduction)." (1996) 30 *U. of San Francisco L. Rev.* 891.

But the concern is not always with accuracy and inaccuracy. In some cases, film serves as a vehicle for the writer's discussion of other legal issues. So, for example, Menkel-Meadow looks at narratives about lawyers in film (and literature and television) as a way of illustrating the ethics and morality of lawyering.¹⁵ La Forest uses *The Piano* as a vehicle for discussing issues of property while Hanigsberg uses the same film to discuss law's unease with female desire.¹⁶ *Thelma and Louise* serves as a vehicle to explore outlaw culture and women as lawbreakers.¹⁷ *Sister My Sister* and *Heavenly Creatures* foster an exploration of the social representation of lesbian criminality.¹⁸ *Besieged* becomes a vehicle for a discussion of the treatment of selfless love within legal regimes.¹⁹ *Unforgiven* is an exploration of vengeance as a motivation of the informal legal regime;²⁰ *Rashomon*, *A Question of Silence* and *Adam's Rib* provide a means of exploring the relationship between law, society and culture.²¹

There is another body of writing on law and film which reports on the pedagogical deployment of film in the classroom. Some writers have discussed their uses of film in the class as driven by pedagogical concerns, finding film a helpful vehicle for exploring legal issues.²² Rosenberg, for example, writes about using *Casablanca* as a manner of teaching law students about legal pluralism and the conflict between various ethical systems,²³ Meyer reports on his use of film as a means of introducing outsider perspectives and encouraging attention to legal imagination.²⁴ Sokolow discusses his use of film in an attempt to have students think differently about "facts."²⁵

-
- 15 C. Menkel-Meadow, "The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, film and Television, and Ethical Choices Regarding Career and Craft," (1999) 31 *McGeorge L. Rev.* 7.
 - 16 A. Warner La Forest, "A Deceptive Cadence: Nineteenth-Century Property Law and Popular Culture's Perception of *The Piano*" (1995) 3 *Can. J.L. & Soc.* 31; J. Hanigsberg, "An Essay on *The Piano*, Law, and the Search for Women's Desire" (1995) 3 *Mich. J. of Gender & Law* 41.
 - 17 E.V. Spelman, & M. Minow, "Outlaw Women: *Thelma and Louise*" in *Legal Reelism*, *supra* note 8 at 261.
 - 18 J. Millbank, "From Butch to Butcher's Knife: Film, Crime and Lesbian Sexuality" (1996) 18 *Sydney L. Rev.* 451 at 453.
 - 19 A. Acorn, "Besieged By Beneficence: Love, Justice, and the Autonomous Self," (2000) 63 *Sask.L.Rev.* 69.
 - 20 W.I. Miller, "Clint Eastwood and Equity: Popular Culture's Theory of Revenge" in A. Sarat & T.R. Kearns, eds., *Law in the Domains of Culture*. (Ann Arbor: University of Michigan Press, 1998) at 161.
 - 21 See O. Kamir, "Judgment By Film: Socio-Legal Functions of *Rashomon*." (2000) 12 *Yale J. L. & Humanities* 39; and O. Kamir, "X-Raying Adam's Rib: Multiple Readings of a Feminist Law Film" (2000) 22 *Stud. L., Pol. & Soc.* 103-129. See also O. Kamir, *Every Breath You Take: Stalking Narratives and the Law* (Ann Arbor: University of Michigan Press, 2000).
 - 22 A. Chase, "On Teaching Law and Popular Culture" (1998) 3 *Focus on L. Stud.* 1; S. Greenfield & G. Osborn, "The Empowerment of Students: The Case for Popular Film in Legal Studies" (1995) 10 *Focus on L. Stud.* 6.
 - 23 N. Rosenberg, "A Word is Just a Word: Bringing Classical Hollywood Films into Legal Studies Classes" (1992) 7 *Focus on L. Stud.* 2.
 - 24 P.N. Meyer, "Law Students Go To the Movies" (1992) 24 *Conn. L. Rev.* 893; P.N. Meyer, "Visual Literacy and the Legal Culture: Reading Film As Text in the Law School Setting" (1993) 17 *Leg. Stud. Forum* 73.
 - 25 D.S. Sokolow, "From Kurosawa to (Duncan) Kennedy: The Lessons of *Rashomon* for Current Legal Education," (1991) *Wisconsin L. Rev.* 969.

The reception of literature on law and film has been mixed. For some, it seems little more than the logical extension of the law and literature movement, which has emphasized the importance of attending to the stories we tell about law and the ways in which practices of storytelling are indeed central to law itself.²⁶ Others have noted that law and film scholarship has not drawn on film theory in quite the same way that law and literature scholars have drawn on literary theory. Indeed, one might suggest that lawyers often approach film without the kind of fear that they approach literature. As Black puts it, one could observe that some law and film scholarship would be inadequate as film scholarship *per simpliciter*. One might ask, then, whether there is really much of value in the move to film? Why focus on film and not just literature? Does a "law and film" combination simply risk the creation of a category of scholarship that is simultaneously inadequate as either film or legal scholarship? Do legal scholars enter into the cinema at their risk?

Black suggests that some of these kinds of critiques miss the point. Scholarship in law and film is scholarship directed towards a specific purpose—understanding (and even altering) the role of law in society. The irony of this, Black suggests, is that:

[I]t is easier for legal scholars to use films for pedagogical purposes than it is for film scholars—a least the former have more of a purpose, with relation to their professional activities, in doing so. In law, there is something at stake: it really matters whether future lawyers, judges, and legislators have been called upon (via film or otherwise) to reflect on certain matters.²⁷

That is, in spite of the lack of fluency of many lawyers with film theory, much of the writing on law and film is useful pedagogy within legal scholarship since legal scholarship struggles with the imperatives not only to produce good scholarship, but also to engage with concrete practices of law in the real world. We make this point out of a desire to encourage an open, rather than fearful, response to the cinematic turn. At even the most surface levels, looking at film can be a positive force, *albeit* at the level of encouraging students to think about the ways that stories about law influence the ways they think about legal judgements. But we also want to suggest that the legal scholar willing to work more deeply with film may find him or herself tapping on some very rich resources.

III. ELEMENTS OF A CRITICAL CINEMATIC LEGAL METHOD

One of our aims in writing this paper was to examine more closely the "gravitational pull" of film for legal scholars in an effort to break it down into its constitutive elements. What are the aspects of film that can be use-

26 E.V. Gjemmette, "Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum" (1989) 23 *Valparaiso U. L. Rev.* 267. Other law school. Other law school symposia devoted to issues of popular culture include: (1989) 98(8) *Yale L. J.* [Popular Legal Culture]; (1994) 18(3) *Vermont L. Rev.* [Lawyers as Storytellers & Storytellers as Lawyers]; (1995) 10 *Can. J. L. & Soc.* [Law and Popular Culture].

27 Black, *supra* note 3 at 137.

ful for legal scholars? We have suggested that law and film both function as "arbiters of the social imaginary," that is, they participate in constructing the social world in which we live. We turn to film, in part, because we suspect that films may reveal aspects of this "constitutive" or meaning making function that our own discipline tends to obscure. This paper seeks to look more carefully at three such aspects: (1) the centrality of narrative (2) the role of "brute perception" and (3) the implications of audience reception.

A. Narrative, Truth and Meaning in Film and Law

The first insight that we think film may hold for law relates to the constitutive role of narrative. Narrative is one of the primary cognitive tools that we use to make sense of the world. We use story to give meaning and coherence to the events that we experience. The universal appeal of cinema is built upon this narrative bedrock. Although, as we will see in the next section, movies do more than simply tell a story, storytelling is a vital part of what they do. The social power of films comes in part from this narrative role. Looking at film also foregrounds the sometimes complicated relationship between truth and fiction and reminds us of Benedict Anderson's insight that "fiction seeps quietly and continuously into reality, creating that remarkable confidence of community in anonymity which is the hallmark of modern nations."²⁸

In thinking about how narrative functions, we are drawn to ask whether models of narrative should be thought of independently from the fact/fiction distinction? For example, in a discussion of how children enter into meaning through making narrative sense of the world, Jerome Bruner observes that the power of a story does not necessarily depend on its truth/fiction valence. At its heart, narrative is about the organization of experience. It is possible that the issue of truth vs. fiction might not be as central to our understanding of the world as the structure of narrative itself (regardless of truth or fictionality).²⁹ Certainly, Bennett and Feldman's research suggests that story structure is an essential explanatory variable in social judgment processes.³⁰ In our view, narrative structures play a crucial

28 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991) at 36.

29 J. Bruner, *Acts of Meaning* (Cambridge, Mass.: Harvard University Press, 1990). Bruner suggests that narrative contains a particular structure, and that there are four constitutive elements that must be present in this narrative structure (at 77):

Narrative requires ... four crucial grammatical constituents if it is to be effectively carried out. It requires, first, a means for emphasizing human action or 'agentivity' – action directed toward goals controlled by agents. It requires, secondly, that a sequential order be established and maintained – that events and states be 'linearized' in a standard way. Narrative, thirdly, also requires a sensitivity to what is canonical and what violates canonicity in human interaction. Finally, narrative requires something approximating a narrator's perspective: it cannot, in the jargon of narratology, be 'voiceless.'

30 W.L. Bennett & M.S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (New Brunswick, N.J.: Rutgers University Press, 1981) at 89. Indeed, where audiences are required to guess the truth of stories in contexts where there is no guarantee that the teller is bound to tell the truth, guesses as to truth are as often incorrect as correct. Their study showed that the structural integrity of a story was much more closely related to its believability than factors related to the manner of storytelling (i.e. length, actions, number or length of pauses).

normative role in our society, one which is systematically overlooked by traditional approaches to legal scholarship. Narrative functions as the arbiter of social boundaries. Recognizable narrative structures define what is canonized and what violates the canon in both the "cinematic" and the "real" world.

Following these insights, there are good reasons to treat "fiction" as something more than mere escapism or entertainment. As Ray puts it:

[I]n this century, the movies have provided their audience with some of the most compelling, most abiding representations of the mental and physical conditions of our lives. As an arena, the movies (and now their offspring, television) have constituted the most visible site of an ideological struggle waged for access to, and control of, these representations.³¹

Indeed, over the past fifty years, film has provided the increasing bulk of our society's stories. One reason that film can be a powerful tool for critical methodology is that it provides an occasion to attend to the ways in which fiction, with its representations, is crucial to community building and to our conceptions of law and justice. Film is a site for the working through of tensions over competing visions of justice and legality, such as *The Man Who Shot Liberty Valance*,³² or in films in which law explicitly impedes the just outcome, such as *The Insider*.

The Insider is not unique among Hollywood films in its characterization of the vexed relationship between law and justice. Indeed, as is clear in any number of Grisham-based movies, law rarely operates in the movies as in the positivist ideal that is taught in law schools.³³ However, *The Insider* provides a further layer for analysis in its central consideration of the place of "story" inside and outside the legal process. One could even suggest that the star of *The Insider* is neither of the movie's two Hollywood "stars"—the producer (Al Pacino) or the whistle blower (Russell Crowe)—but the story itself. The role that the story will play in the film is illuminated in a pivotal scene where the two main characters begin their complicated dance with each other in the shadow of the law. Their first contact takes the form

31 R.B. Ray, *A Certain Tendency of the Hollywood Cinema, 1930-1980* (Princeton, N.J.: Princeton University Press, 1985) at 21.

32 There is an extensive discussion of this particular tension in the American Western in Ray, *Ibid.*, particularly chapter 2: "Real and Disguised Westerns: Classic Hollywood's Variations of its Thematic Paradigm." See also C. Ryan, "Print the Legend: Violence and Recognition in *The Man Who Shot Liberty Valance*," in *Legal Reelism*, *supra* note 8 at 23.

33 For an interesting discussion of the tensions exhibited in these "lawyer as superhero" movies, see J. Grant, *supra* note 10. She argues that in these films, one sees a new set of stories about the relationship of the "superhero" to the late 20th century mythological systems of reason and law. The superhero, endowed with ability and a willingness to do good, is generally placed on the side of the law. This, however, is only true insofar as the legal system is understood and portrayed as just. This relationship, she argues, "becomes unstable when the forces of evil appear to lurk within or even control the law and the state." (at 1111-1112). In these films, the hero eventually defeats the forces of evil (often using the very tools of technological rationality deployed by the bad guys) by keeping sight of the link between justice and reason. Indeed, at the heart of those particular stories is the need for lawyers to be ferocious in the defence of justice.

of an intense exchange of handwritten faxes: "I can't talk to you."; "Can't Talk?, Won't Talk?, don't Want to Talk?"; "Can't, Won't, Don't Want To." In this scene we learn that narrative is never simply given or received; it is constructed within a world of complex constraints and possibilities, including legal constraints and the threat of legal punishments.

The insider's story, interestingly, is both absolutely central to the film and rendered opaque to it. That is, the film is all about "getting the story out" and yet in the film, the "story"—that is, the interview with the insider—is only revealed in soundbite-like fragments, repeated with the same poignant soundtrack, at strategic moments in the film.³⁴ The audience is presumed to be able to "read in" the missing text. Tellingly, the film's normative foundation, the "truth" of the insider's story, is left textually indeterminate.

1. Narrative Truth/Historical Truth

The limits of law in grappling with the normative power of narrative are further revealed in the useful distinction between narrative truth and historical truth drawn by Donald Spence:

Narrative truth can be defined as the criterion we use to decide when a certain experience has been captured to our satisfaction; it depends on continuity and closure, and the extent to which the fit of the pieces take on an aesthetic finality. Narrative truth is what we have in mind when we say that such and such is a good story, that a given explanation carries conviction, that one solution to a mystery must be true.³⁵

In contrast, historical truth is time-bound and dedicated to correspondence rules. Historical truth tries to approximate what actually happened. Problems arise, according to Spence, when the two types of truth are conflated, as they frequently are in the process of analysis. Narrative truth, the truth of a well told story, is the type of truth that conveys meaning. Historical truth, on the other hand, or the truth of events as they actually happened, is both confusing and elusive. Although Freud insisted that the aim of his method of free association was to allow patient and analyst to get to the "historical truth" of a life, Spence argued that the real power of the talking cure comes from its meaning-making function; the ability of the analyst to assist the individual in producing a coherent narrative, a story that makes sense of that person's life. Whether or not the story is "true" in a referential sense, that is, whether it is an accurate reflection of actual events in that person's life, is of secondary importance.

A similar conflation of these two types of truth happens in law. That is, the positivist conception of law presumes that the legal system is designed

³⁴ This deployment of sound in this manner in this particular film is hardly surprising. The film is directed by Michael Mann, famous for his use of music to convey emotional mood and truth in the much watched *Miami Vice* television series.

³⁵ D.P. Spence, *Narrative Truth and Historical Truth: Meaning and Interpretation in Psychoanalysis* (New York: W.W. Norton & Company, 1982) at 31.

to allow us to most closely approximate the historical truth of an event. That is, once all the evidence is in, the judge and/or jury are in the best possible position to be able to say what actually happened. Law/film scholars such as Richard Sherwin, however, have pointed out (and good trial attorneys have long known) that in the adversarial setting of the courtroom it is most often narrative truth that prevails.³⁶ That is, the better story, the one that ties up the most loose ends, the one that makes sense to the decision-makers and that conforms with narrative expectations, is the one most likely to be believed.

The relationship between narrative and justice is clearly problematized by Errol Morris's documentary film, *The Thin Blue Line*. It is a film that carefully examines the circumstances surrounding the conviction of a Texas death row inmate for the murder of a police officer. The film prompted a re-examination of the conviction by the courts and the eventual release of the convicted man. *The Thin Blue Line*, however, is more interesting for its methods than its eventual consequences. The movie reveals the way in which competing narratives function in the operation of the justice system by re-enacting the events of the night of the murder from the perspective of each of the witnesses, in turn effectively "fictionalizing" a series of accounts that each purport to be the "truth" of the matter. Some, like Sherwin, have suggested that Errol Morris's film is, in this respect, truly postmodern in its embrace of the relationship between available alternative versions of a story and the subject position of the teller. That is, they suggest that he is telling us that in the end we can't know who killed the police officer. And yet the film clearly comes down in favour of the wrongfully convicted accused. Morris himself has said of the film, "I wanted to make a movie about how truth was difficult to know, not impossible to know."³⁷ The insight about the power of narrative that Morris so effectively reveals in his film has deeply troubling consequences for law, so troubling that even *he* is reluctant to embrace them.

Law continues to conflate narrative truth and historical (correspondence) truth for good reasons. The alternative is profoundly destabilizing. Acknowledging the power of narrative truth in the courtroom and its pull on legal decision-makers means also giving up on the notion that legal truth is singular. That is, that there is one right answer, one just result. Once one enters the realm of narrative truth, it is necessary to acknowledge the possibility of available alternative tellings of the story. Despite its implications, we argue, the power of narrative truth should not be overlooked. Rather, we need to spend more time developing the tools for understanding the ways that narrative pulls on our imaginations, the kinds of stories that structure the world we inhabit and how those stories play a role inside legal institutions.

36 See P.N. Meyer, "'Desperate for Love': Cinematic Influences upon a Defendant's Closing Argument to a Jury" (1994) 18 *Vermont L. Rev.* 721; P.N. Meyer, "'Desperate for Love II': Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case" (1996) 30 *U. of San Francisco L. Rev.* 931. See also Bennett and Felman, *supra* note 30; Sherwin, *supra* notes 14.

37 Sherwin, *supra* note 4.

Of course, film is not the only source of social narratives. Literature has long been a powerful source of storytelling. Certainly the law and literature movement has provided a significant foundation for the work that has been done to date on law and film. An understanding of the narrative techniques at work within literature can certainly sharpen one's approach to other forms of fiction. However, though the techniques of cinema are no less ingenious than those of literary narrative, we agree with Black that many discussions of narrative and narrativity do seem to privilege written forms. This is so despite the fact that there is no reason to presume that written narrative is the locus of the powerful grasp that storytelling has on the social imagination. Narrative also exists in oral cultures beyond the technologizing power of the written word.³⁸ Indeed, there is evidence which strongly suggests that narrative, "the kind of storytelling so central to human existence," is something acquired by children long before they have words.³⁹ They learn about narrative in a context where perception is the guiding force (seeing, touching, hearing, smelling, etc.) As we examine in the following section, film may be a valuable tool for understanding how narrative works precisely because it captures these pre-linguistic elements of brute perception.

B. Cinema and the World of Perception

Much of the current writing in film and law has focused on the story at the heart of the film; much less attention has been paid to specifically cinematic elements in film.⁴⁰ Thus, is it often the case that a plot summary is thought to be sufficient to let the reader know what is going on in a film. But while film and literature share many common concerns and some common techniques, film is not simply a (lesser) subset of literature. The cinematic turns attention to certain features of lived experience in a manner distinct from literary forms. Consider Andrew's comment on Jean Mitry's theory of film:

[Cinema] is the art in which our mute perceptions take on meaning and value. If the novel makes us feel the interdependence of man and man or of men and the world, it does so abstractly, through words and figures of speech; film, on the other hand, does so through the normal process of brute perception.⁴¹

Part of what is potentially interesting about the methodological turn to film may be the ability to access just those cinematic elements, elements which work through the normal process of brute perception.⁴² Certainly film engages us in the world of perception: we see things, and we hear

38 See W.J. Ong, *Orality and Literacy: the Technologizing of the Word* (London: Routledge, 1988).

39 Bruner, *supra* note 29.

40 Some notable exceptions include Meyer, *supra* note 14; and Kamir, *supra* note 21.

41 J.D. Andrew, *The Major Film Theories* (London: Oxford University Press, 1976) at 208.

42 Black, *supra* note 3 at 131-32.

things. In exploring the narrative in any given film, it is useful to supplement a discussion of plot with an exploration of the significance of cinematic elements such as lighting, camera angles and focal lengths, shot duration, editing, diegetic and extra diegetic sound.⁴³ Each of these factors has implications for the ways in which brute perceptions come to hold meaning.⁴⁴ Lighting not only permits us to see the action, but creates a sense of space and mood, and guides our attention to certain objects and actions. Angles and focal lengths modify perspective in ways which distinctly affect the spectator's experience.⁴⁵ Camera orientation plays an important role in encouraging certain kinds of experience. Deep focus shots allow for greater spectator detachment, while more subjective camera angles can pull the viewer into closer identification with specific characters.⁴⁶ Most certainly, anyone who has had the experience of watching a horror film with the sound turned down is aware of the role of extra-diegetic sound in creating the experience of fear. *The Insider* provides a clear example of the importance of the aural to the filmic experience. During the scene where the insider gives his interview to the producer, Lisa Gerrard's haunting vocals play in the background, increasing one's sense of unease and conveying a sense of the threat or danger, though there is nothing visually dangerous in the scene. It is the music which carries the weight of conveying a sense of gravity and danger.

As an example of the perceptual power of the cinematic, consider the opening moments in Joel Schumacher's controversial 1992 film *Falling Down*.⁴⁷ The film follows a man (known by his personalized license plate, "D-FENS") who abandons his car on a gridlocked Los Angeles freeway and begins a cross-city trek on foot, trying to get home for his daughter's birthday. His quest for home spirals into an increasingly violent rampage, culminating in a Western-like show-down between D-FENS (played by

43 Diegetic sound is that coming from within the story world. It may be external (dialogue between characters, lawnmowers running, a record playing while a couple dance) or internal (the voice-over of Harrison Ford in *Blade Runner*, giving us access to the internal world of a character in the fictional world). Extra-diegetic sound is that added to the film, by way of soundtrack, mood music, sound emanating from outside the film's fictional world. See generally, D. Bordwell & K. Thompson, *Film Art: An Introduction*, 5th ed (New York: McGraw-Hill, 1997), c. 9.

44 For a good introduction to the techniques of cinema, see Bordwell & Thompson, *ibid*.

45 For example by distorting objects or characters, transforming scale or depth via zoom shots. For an interesting catalogue of examples, see Bordwell & Thompson, *supra* note 43 at 216-226.

46 And, indeed, the director may occasionally use both kinds of angles to allow for a very specific kind of experience. For example Ray notes that in *The Godfather*, when Michael kills Sollozzo, the scene shots alternate between point of view shots (identifying the viewer with Michael) and objective long shots (frozen tableaux encouraging estrangement). This technique allows the scene to be both involving and repellant, to make the viewer want the murder to happen, and yet feel appalled when it does. See Ray, *supra* note 31, at 336-339.

47 There is some very thoughtful literature on this movie from film theorists. In particular, see Carol Clover, "White Noise" (1993) 3 *Sight and Sound* 6; J. Davies, "'I'm the bad guy?': *Falling Down* and White Masculinity in 1990s Hollywood," (1995) 4 *J. of Gender Stud.* 145; F. Pfeil, *White Guys: Studies in Postmodern Domination and Difference* (London: Verso, 1995) at 238-243; J.P. Telotte, "Definitely—Falling—Down," (1996) 24 *J. of Popular Film & Television* 19.

Michael Douglas) and on-the-verge-of-retirement cop, Prendergast (played by Robert Duvall). The film is complex, as is the film's stance with respect to Douglas—are we or are we not supposed to identify with him? While a person may or not “choose” to identify with Douglas, in the opening minutes of the film, a combination of cinematic elements (diegetic and extradiegetic sound, closeups, increasingly rapid editing) encourages identification with Douglas by pulling the viewer deeply into his subjective world. How does the film do this?

The movie opens with a black screen and silence, except for the sound of someone breathing in and out. As the darkness dissipates, the camera comes in directly below a man's sweaty face, shifting upwards to give up a full screen closeup of Michael Douglas's face—close enough to be uncomfortable. He is looking straight ahead, his face is beaded with sweat and all we can hear is the overpowering sound of his laboured breathing. Gradually, the focus opens out, and we see that he is sitting in the driver's seat of a car trapped in traffic on a hot summer day. As he pushes at the console, we understand that the air conditioning is not working. Nor does the window of the car open. The only sound we hear is still the overpowering sound of his rather laboured breathing. We also hear a fly, buzzing around the car, occasionally settling on the back of Douglas's neck. Traffic noises slowly start to build. As they do, using shot-reverse-shot sequences and point of view camera work, we are taken rapidly back and forth from Douglas's eyes to what he is seeing and hearing: other cars, children hanging out of bus windows, people yelling into phones and cursing. Gradually, these noises from outside grow louder and louder, the sound of a fly buzzing around in the car is amplified and a pulsing beat (extra-diegetic) increases in both volume and pulse. The shots increase in rapidity, flicking from closeups of Michael Douglas to the other cars and their occupants, billboards and bumperstickers in an increasingly rapid fire motion, until finally Douglas forces open the door of his car and scrambles out. At this point, the sound and rapid fire editing return to normal and the viewer is left with the same sense of having escaped a claustrophobic hole. While it is too early in the film to say that one “identifies” with Douglas, the viewer has been given a nearly visceral experience, based primarily on the manipulation of brute perceptions.

In a scene like the above, the visual and aural play important mutually reinforcing roles. Certainly, in film, sound and image are deployed together as guarantors of two radically different modes of knowing: the seeming concreteness of the visible is conducive to an ideology of empiricism, while the ineffable, intangible quality of sound places it on the side of the emotional or intuitive.⁴⁸ The co-presence of these two forms of knowing, Doane argues, opens up the possibility of exposing an ideological fissure—of pointing out the irreconcilability of these two forms of truth. However, as she points out, if done right, film does not separate “I see” from the “I

48 M.A. Doane, “Ideology and the Practice of Sound Editing and Mixing,” in T. de Lauretis & S. Heath, eds., *The Cinematic Apparatus* (New York: St. Martin's Press, 1980) 47 at 50.

hear." Instead, "there is the *I feel, I experience*, through the grand-total of picture and track combined."⁴⁹ And in the world of law, the power of this combination is at the base of the view that one should not lightly overturn the findings of a trier of fact: the combination of "I see" and "I hear" is thought to provide a more powerful sense of truth than is possible in the world of analytic thought detached from the concrete world of "I feel, I experience." The trier of fact is thought to be best situated to judge the truth/credibility of events because the trier of fact experiences the testimony through the normal processes of brute perception. The cinematic may play an important role in courtroom credibility issues, in alternative dispute resolution models, in mediation and in lawyer/client meetings.⁵⁰

For those interested in the intersection of law and film, an analysis of visual images may require a manner of reading different from that required for the study of written texts. As Bill Nichols notes, the visual has a certain "indexical wham" that makes it seem as if visuals can easily be read off their surfaces.⁵¹ However, when using film, it is often necessary to spend time pushing past this notion. Visual texts are deceptive and are *not* so easily read off their surfaces. While the visual may seem to more powerfully approach something like reality, the visual is a text which derives its meaning in dialectic with the viewer.⁵² Indeed, the complexity of the relationship between the image and the viewer is painfully evident in disparities between different groups viewing the Rodney King videotapes.⁵³ That is, to say that film can create the experience of "*I feel, I experience*" is not to say that film simply reflects the 'real.'⁵⁴ What film has at its disposal is access to a range of techniques that can create the *impression* of an unmediated access to an existing reality. We emphasize the word "impression"

49 *Ibid.*

50 See Meyer, *supra* note 36.

51 F.P. Tomasulo, "'I'll See it When I Believe it': Rodney King and the Prison-House of Video" in Sobchack, *supra* note 5, 69 at 71. Tomasulo attributes the phrase to Bill Nichols, in a paper titled, "A Visible Evidence," Tomasulo, *ibid.* at n. 10. In his book, *Blurred Boundaries*, *supra* note 5 at ix, Nichols says, "I use *indexical* to refer to signs that bear a physical trace of what they refer to, such as the fingerprint, X ray, or photograph."

52 Spence, *supra* note 35, points out this in his discussion of the meaning of dreams, a form which is similarly in the realm of the visual.

53 Tomasulo, *supra* note 51. See also J. Fiske, "Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture" (1996) 30 *U. of San Francisco L. Rev.* 917; Nichols, *supra* note 5, particularly chapter 2: "The Trials and Tribulations of Rodney King."

54 Certainly, part of the debate between formalist and realist schools of film theory centred on this very question. The formalist assertion that film was unable to perfectly imitate normal visual experience was linked to their argument that the limitations of film defined its expressive potential, giving the film maker an opportunity to use film's specific properties [editing, montage, etc.] to manipulate and distort our everyday experience of reality for artistic ends. The realists, on the other hand, argued that film's ability to mechanically record allowed it to perfectly imitate our normal visual experience of reality and that it was this ability to imitate reality that defined film as art. These debates primarily concerned the question of whether and why film was "art." Certainly, there would have been agreement across both schools of thought that the range of cinematic techniques give film the capacity both to record and distort experience. See W. Buckland, *Film Studies* (London: Hodder & Stoughton, 1998) at 20-21. For a discussion of the theories underpinning formalism and realism, see Andrew, *supra* note 41 at c. 1- 2.

since it has long been clear that there is no unmediated access to any existing reality: the "normal processes of brute perception" are, of course, themselves shaped by many factors including gender, race, class and personal history.

The point of interest for scholars of law and film is not that film gives some more objective, unmediated, pure access to truth. The point is rather that cinematic techniques allow film to appear somewhat like life.⁵⁵ This fact is both useful and dangerous. We rely on experience to make sense of the world. Filmic re-creations of experience can be profoundly influential because they can take one through a variety of situations, to explore what it might feel like to live a different kind of life. The "*I feel, I experience*" possible in film can lead one to identify with marginalized groups, to understand the suffering of the victimized. But it can also lead one to sympathize with a victimizer, or to participate in the scapegoating of outsider groups.⁵⁶ There are clear dangers in an approach which deconstructs the ways in which film attempts to construct a certain kind of response. However, it also seems indisputable that in film, as in life, brute perceptions are themselves mediated. Film provides a valuable (if also dangerous) mechanism for exploring the ways in which perceptions are mediated by that which we "know" or "believe" about the world. This, of course, leads us to a third issue in the study of law and film: the question of audience response.

C. Audience Response / Postmodernism and Legitimacy

Cinema gains its power in part from its ability to engage more directly with the world of perceptions. But this engagement is never unmediated and this was well understood by even early film theorists. So, for example, while Sergei Eisenstein believed that shots could provoke reactions in spectators, he did not see the shots themselves as anything as simple as reflections of reality. Further, he did not see meaning as simply resident in those shots. On the contrary, for him, "In film the senses perceive attractions, but cinematic meaning is generated only when the mind leaps to their comprehension by attending to the collision of those attractions."⁵⁷ Put

55 It is in this respect that film can prove so valuable as a pedagogical tool. It allows one to begin with a "common experience" that includes visual and aural coding and then go through the process of asking about how the film constructs knowledge and shapes the experience and relies on codes and cues about appropriate ways of explaining the world. In some ways, it makes possible in the classroom the kind of learning people often have in their "real lives,"—that is, the phenomenon of having an experience, giving one set of meanings to that experience and later reconstructing the experience or situating it differently in the context of other knowledge. In the film context, one can have a certain experience and then concretely move through it, exploring both competing interpretations and the role of conventions and cues in the construction of that experience. It is to practice the application of critical skills in contexts that seem to have a closer experience to everyday experience than do traditional texts. In the process, it may be easier to draw connections between the life of the law as seen in the text and the life of the law as a lived social experience.

56 There is certainly an extensive literature dealing with the portrayal of Jews and other marginalized groups in Nazi propaganda films. See also C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: Osgoode Society for Canadian Legal History, 1999). She discusses the ways in which Griffith's racist film *Birth of a Nation* was used as a tool of recruitment by the Klu Klux Klan, both in the U.S. and in Canada.

57 *Supra* note 41 at 52.

another way, "film is not a *product* but an organically unfolding creative *process* in which the audience participates both emotionally and intellectually."⁵⁸ Using shots and montage to piece together fragments engaging the brute sensations of perception, the spectator (for Eisenstein) is given not a complete image, but the experience of completing an image. In this art, he argued, we are "... led away from logic to re-experience our primary mode of understanding."⁵⁹

In exploring the cinematic, we have occasion to explore the ways in which our "primary mode of understanding" is very much mediated. What we see and hear is influenced by what we already know. As Ray notes, in the film world, the relationship between the "real" and the "perceived" is a complex one:

[I]n Althusser's terms, the American Cinema has never reflected 'real' events but at most its audience's relation to those events, and, as I have argued, that relation has at no point been free of cultural conditioning. That is, the very categories of perception that constitute the audience's relation to the material events themselves derive overwhelmingly from the culture that purports merely to reflect them.⁶⁰

Further, as the example of the Rodney King tapes made painfully evident, visual images do *not* speak for themselves. One must account for questions of audience response: how does the experience of the viewer shape what is seen? As Tomasulo puts it: "people generally do not come to believe things *after* seeing them; they see things only when they already believe them ..."⁶¹ This is not to say that response is arbitrary, but it is to suggest that it is not fixed. Indeed, it is to suggest that questions concerning audience response might have a central role to play in understanding narratives about truth and justice. At minimum, it suggests that questions of audience response might be at least as important (if not more important) than questions of authorial intention in determining what a particular narrative means.⁶²

The Godfather provides an interesting example of the ways in which questions of authorial intention can fail to account for the social impact of a given cultural text.⁶³ It appears that Coppola saw his trilogy as a demythologizing challenge to understandings of the U.S. as a pluralistic society liv-

58 *Ibid.* at 66-7.

59 *Ibid.* at 74.

60 Ray, *supra* note 31 at 364.

61 Tomasulo, *supra* note 51 at 82.

62 As cultural theorists have pointed out too often, researchers have focused on the content of media messages without taking into account the complex ways in which audiences interact with those messages. See R. Brunt, "Engaging with the Popular: Audiences for Mass Culture and What to Say About Them" in L. Grossberg, C. Nelson & P.A. Treichler, eds., *Cultural Studies* (New York: Routledge, 1992) at 69. See also J. Fiske, *Television Culture* (London: Routledge, 1987), and D. Morley, *The Nationwide Audience: Structure and Decoding* (London: British Film Institute, 1980).

63 See D.R. Papke, "Myth and Meaning: Francis Ford Coppola and Popular Response to the Godfather Trilogy" in *Legal Realism*, *supra* note 8 at 1.

ing by the rule of law. He offered the Corelone mafia family as a symbol for a lawless and criminal America. Instead, and to Coppola's frustration, it was commonly read as valorizing the mythic family and the legend of the self made man, and as endorsing authoritarian power as an alternative to legalism. Despite Coppola's intentions as the director, the film ultimately had a very different meaning for the public than the meaning he had intended. The point Papke notes is, that:

[C]ultural artifacts are not simply containers into which writers, composers, and directors pour meanings that will later be drained by readers, listeners, and viewers Viewers bring their own tastes, values, and histories to the films, and meanings emerge from the interaction of the film and the viewer's responses to it.⁶⁴

Although it seems clear enough that spectators can use film for purposes other than those the maker intended, Bordwell notes that cinematic interpretation has tended to focus more on the practices of production than on those of reception.⁶⁵ This is no less true of law. Legal interpreters and legal pedagogues have focussed much more intensely on questions concerning the practices of producing law than on questions of the law's reception.⁶⁶ Indeed, whether central or not, questions of audience response are often side-stepped by those concerned with questions of legal and cinematic interpretation. In some ways this is not surprising, given the complexities of determining how an audience makes use of a cultural text (be it a TV program, a film, or a legal judgment).⁶⁷ However, this inattention has real implications for our understanding of the complex ways in which both law and cinema function as interpreters and mediators of our social world. We argue that it is important to take seriously the widespread inattention to questions of audience. This inattention may not simply be a function of the difficulty of assessing response, but may also be evidence of a more deep-seated anxiety about its implications. Once one begins to take seriously the notion of audience response (including the notion that what is seen depends very much on who is doing the seeing), one has to confront the depth of the postmodern challenge to the modernist notion that truth is knowable and simply waiting to be found. Within the discipline of law one finds a powerful will to affirm the modernist vision that the truth is singular and can be discovered.⁶⁸

⁶⁴ *Ibid.* at 17-18.

⁶⁵ D. Bordwell, *Making Meaning: Inference and Rhetoric in the Interpretation of Cinema* (Cambridge, Mass.: Harvard University Press, 1989) at 270.

⁶⁶ In his discussion of legal scholarship on film, Black *supra* note 3 at 115, identifies a tendency in scholarship on law and film (and law and literature, for that matter) to ignore (or simply be unaware of) issues of meaning, authorial intention and reader response.

⁶⁷ See e.g. the discussion in R. Brunt, "Engaging with the Popular: Audiences for Mass Culture and What to Say about Them," in L. Grossberg, C. Nelson & P.A. Treichler, eds., *Cultural Studies* (New York: Routledge, 1992) at 69.

⁶⁸ N.K. Denzin, *Images of Postmodern Society: Social Theory and Contemporary Cinema* (London: Sage, 1991) at 10: Contemporary cinema perpetuates modernist impulses (auteurism, social realism, genre-driven productions such as comedies, cop-mystery thrillers, musicals, westerns, biographies) punctuated by periodic postmodern breaks with the past. Also see Ray, *supra* note 31.

One might argue that cinema is less driven by this modernist vision than is law.⁶⁹ In the world of film, despite the indexical wham, it is easier to acknowledge the ways in which the film has an author and the author has a perspective. But Black would suggest that the strength of the modernist will to believe in an extant truth is also evident in the world of cinematic criticism. Much film criticism, Black argues, could be appropriately labelled “forensic criticism”: assertions that the film “got it wrong.” He argues that while such criticism may seem to wrest narrative power from the film-maker it does not; the right to contest what the film narrates is simply a part of the pact in which film is given the power to narrate. The right to contest is, he argues, a pacifier rather than a weapon. Indeed, to the extent that it reinforces the notion of a right answer, forensic criticism may be evidence of the impotence of responsive power to regimes of representation.⁷⁰ Forensic criticism, he argues, provides little more than diversions which “serve as decoys away from what might otherwise develop into a more penetrating demystification of film or unmasking of its constructive strategies.”⁷¹ As he illustrates:

[T]he *very act* of condemning a film for having gotten something wrong implies that it might have gotten the thing right—which, in turn, implies that the *difference* between reality and representation is quantifiable, describable, and—given the right kind and degree of textual tinkering—reducible to zero.⁷²

That is, forensic criticism tends to reinforce the notion that there is a right answer or a right film out there—it is just a matter of getting the details right.

Black’s discussion of forensic criticism in film certainly resonates with a great deal of legal criticism. At the centre of the legal enterprise is a story which holds law to be primarily about the pursuit of truth. A legal case, done well, attempts to provide an objective recital of a series of events. Thus, in the realm of legal criticism, attention is often directed to errors: the ways in which the judge or jury “got it wrong.” In law, some of the debates are about accurate constructions of reality. Sometimes, the difficulty in challenging a position is that debate flounders on the question of “what really happened.” Criticism of a case is often based on assertions about what was wrong, implying that a right answer was available if only someone had been brave enough to give it, or if evidence had not been

69 Certainly, while the trial process is often said to be about the discovery of truth, film often has a different explicit aim. In the real of social drama, certainly, the concern is less with events as markers of the real than with the different interpretations put upon those events, and the ways in which these interpretations give subtle expression to divergent interests or switches in the balance of power. See, J. Staiger, “Cinematic Shots: The Narration of Violence” in Sobchack, *supra* note 5 at 39.

70 In the context of law, a similar argument is made about the limits to the ability of outsider groups to use the law for social change. See Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

71 Black, *supra* note 3 at 147.

72 Black, *supra* note 3 at 154.

destroyed or if justice had not been subverted for someone's personal gain or because of someone's prejudice or bias.

Forensic criticism, to the extent that it reinforces the notion that there is a right answer somewhere out there, fails to deal with the more difficult insights of postmodern understandings, and with the issues of narrative, perception and audience response discussed above. The insights above pose a challenge to the notion that the relationship between reality and representation is perfectly quantifiable, and thus to the notion (in Fox Mulder's language) that "the truth is out there." This challenge, in the realm of law, is a serious challenge indeed.

IV. CONCLUSION: TAKING THE TIGER BY THE TAIL

"It's not that everything is bad, it's that everything is dangerous,
which is not exactly the same as bad."⁷³ – Foucault

The postmodern world in which we live mounts an undeniable challenge to law. It does so by challenging law's ability to reach the "truth" of the matter, to find closure, to "do justice" with any kind of certainty at all. As Richard Sherwin and others have suggested, *The Thin Blue Line*, as a documentary film that makes extensive use of "fictional" film-making techniques, perfectly illustrates our current dilemma. In addition to the mesmerizing repetitive soundtrack mentioned earlier, the filmmaker uses the juxtaposition of visual images, like the tail-lights of various models of cars, as well as numerous dramatized re-enactments of the crime to destabilize any confidence we might have had in a single eyewitness account. The film reveals a world in which all of the narrators are unreliable, leaving the viewer caught in a maze of contradictory accounts and conflicting motivations. It seems impossible to say for certain what happened on the night the police officer was killed.⁷⁴

This conclusion has potentially devastating consequences for law. It appears to justify a retreat to cynicism and despair. Certainly, there is some evidence that this sense of cynicism is already evident both in the public

73 H.L. Dreyfus & P. Rabinow *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) quoting M. Foucault:

"No! I am not looking for an alternative; you can't find the solution of a problem in the solution of another problem raised at another moment by other people. You see, what I want to do is not the history of *solutions*, and that's the reason why I don't accept the word "alternative." I would like to do the genealogy of *problems*, of *problematiques*. My point is not that everything is bad but that everything is *dangerous*, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism. I think that the ethico-political choice we have to make every day is to determine which is the main danger."

74 While many scholarly commentators on the film would agree with the statement, as we have noted earlier, Errol Morris himself suggested otherwise: "I wanted to make a film about how truth was difficult to know, not impossible to know." Charles Musser, "Film Truth, Documentary, and the Law: Justice at the Margins" (1996) 30 *U. of San Francisco L.Rev.* [Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media] 963 at 975.

perception of law and within law schools. Philip Meyer, reporting on his use of film in the classroom, notes that "passivity, detachment, cynicism and I fear, resentment and anger, are also deeply ingrained features of the new visual literacy."⁷⁵ His students revealed cynicism about the nature of the legal profession and the limited possibilities for justice in law.

Richard Sherwin agrees that the spirit of postmodernism pervades the period of time in which we live, but also suggests that its impact is not monolithic. He distinguishes two streams. The first, "skeptical postmodernism," denies the very possibility of knowing truth or reality, claiming that there is simply no "there" to know. But the life of this form of postmodernism is one of anomie, brittle laughter and despair about the world we inhabit.⁷⁶ It is, he argues, "a life that cannot be lived."⁷⁷ In particular, it is not a life that can be lived within the law, where there is a need for judgment, a need to reach particular outcomes in particular cases and the need for belief to sustain the meanings that legal stories and arguments call to mind for the sake of judgment. Accordingly, Sherwin suggests that the law is no place for the skeptical postmodernist viewpoint, which requires us to watch it all with a frightening irony or a bemused detachment.

In the alternative, Sherwin offers what he now calls the "affirmative postmodern" position. Those operating from within the spirit of this form of postmodernism see that knowledge is constructed, but remain believers in the substance of certain images, feelings, myths and dramatic forms as a way of hooking us into particular ways of seeing, thinking and feeling about ourselves and others and events around us.⁷⁸ The point is not to deny that meaning is constructed, but rather to ask more questions about how that process of construction happens. It is to acknowledge that internal forces like the drive for meaning can still account for events in our social world. This approach is close to something he calls "tragic wisdom":

Unlike skeptical postmodernism, tragic wisdom seeks to go beyond the critical capacity to recognize the rhetorical (or aesthetic) forms of cultural and cognitive meaning making. It also seeks to cultivate our capacity for enchantment, the ability to feel and affirm the normative force of meaning's appeal. This is what it means to accept the responsibility of a mature as opposed to naïve constructionism.⁷⁹

A parallel argument in the world of film is provided by eminent film theorist David Bordwell. He mounts a call for a "historical poetics" of film, an approach which shifts both the goals and methods of film theory. Rather than asking how a film provides an occasion to entertain the juxtaposition and development of semantic fields (the critic using those fields to build up

⁷⁵ *Visual Literacy*, *supra* note 24 at 893.

⁷⁶ A similar argument about the difficulty of finding the space for living between anomie and rigidity is made in Windisch, Uli. *Speech and Reasoning in Everyday Life*. trans. by I. Patterson (Cambridge: Cambridge University press, 1990).

⁷⁷ *Narrative Construction*, *supra* note 14 at 708.

⁷⁸ *Narrative Construction*, *supra* note 14 at 693.

⁷⁹ Sherwin, *supra* note 4 at 230.

meanings), he suggests that there are more interesting questions, such as “How are particular films put together?” and “What *effects* and *functions* do particular films have?” Bordwell’s approach accounts for the “undeniable power of social agents to make and execute plans,” but also makes us look to aspects of the film shaped by the “invisible hand” of larger social forces.”⁸⁰

We agree. Not only do we think it is important to understand the social effects and functions of film, we think we can use film and film theory to help us understand how to unpack these things and transfer this knowledge over to the legal context. Undoubtedly, all visual readers are not equally familiar with the tools of cinematic persuasion, but we do think that film offers a non-threatening way to expose these tools as tools. Using film, it is possible to approach a text without an emotional load and to ask a series of questions. How does the film do what it does? How is the story arranged? What details are foregrounded, and what pieces of information left unsaid? What angles are used, and what perspectives are we shown (*e.g.* do we see with an objective camera or point of view? Are we seeing through the eyes of a specific character?) Once these tools are developed in the context of film, they can be easily transposed to a legal context. That is, a person can now ask similar questions of legal texts. Such questions are of course not new. There is a long tradition of legal scholarship concerned with the construction of reality through the admission, exclusion and interpretation of facts.

In this way, our juxtaposition of film and law, rather than leading to a position of cynicism or despair, can suggest a new range of questions about meaning and truth in law. What is important for us is the particular ways in which truth and justice are understood in the classroom, courtroom, chambers as well as in the wider public sphere. The critical cinematic methods we have outlined give us some tools by which to try to understand the mechanisms and processes by which legal truths are constructed, constrained, contested and conjured. We can then take those tools and ask questions about the legal world. How do available narratives operate to amplify the veracity of a particular account? When are they drawn upon and to what ends? How does the “indexical wham” of brute perception work for a trial judge hearing a witness? In what ways do the uses of new media in the courtroom mimic the techniques of advertisers? Should these correspondences trouble us? How can we better integrate a range of perspectives regarding the “justice” of the legal system in particular cases? As hopeful pragmatists, we think that better understandings of these mechanisms will enable us to work collectively toward more just outcomes, even in a world of unreliable narrators and competing truths.

As Sherwin points out, these processes of meaning making are at the core of what we need to understand about how law and popular culture reference and influence one another. Recognizing the synchronicities of law and popular culture, at one level, is simply an acknowledgement that there

80 Bordwell & Thompson, *supra* note 43 at 269-272.

is always going to be a mythic element to our constructions of the world, what Sherwin refers to as forms of enchantment. Law is undeniably caught up in this mythic, world-making aspect of our ongoing collective project of constructing social meaning, so it is impossible to claim or reclaim for it some place of rationality apart from or above the (pop-cultural) fray.

We are all engaged in the mythic processes of world-making,⁸¹ no less as lawyers, law teachers and judges than as film-makers. Struggles over meaning, shifting social roles and expectations get played out in films and in courtrooms every day. Learning how to unpack the interweave of truth, justice and narrative might help us to see how law comes to recognize some emerging claims for justice while dismissing others.

81 *Supra*, note 1.